



In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1705

RUSSELL E. TRAIN, Administrator of the
Environmental Protection Agency, *Cross-Petitioner*

v.

E. I. DU PONT DE NEMOURS AND COMPANY, et al.,
Cross-Respondents.

**On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Fourth Circuit**

MEMORANDUM FOR THE CROSS-RESPONDENTS

Cross-respondents agree that this Court should grant the cross-petition for a writ of certiorari in this case.

This cross-petition (No. 75-1705) and the petition (No. 75-1473) relate to the Fourth Circuit's decision in *E. I. du Pont de Nemours & Co. v. Train*, ____ F.2d ____, 8 E.R.C. 1718 (4th Cir., decided March 10, 1976) ("*du Pont II*"). The questions presented in the petition in No. 75-1473 pertain to the effluent regulations issued for existing sources by the Environmental Protection Agency ("EPA") under the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 *et seq.* ("the Act").¹ The

¹ The questions presented in the petition in No. 75-1473 are identical to those raised in *E. I. du Pont de Nemours & Co. v. Train*, No. 75-978, petition for a writ of certiorari granted 44 U.S.L.W. 3592 (U.S., April 19, 1976) ("*du Pont I*"). On April 13, 1976, concurrently with the filing of the petition in No. 75-1473 (*du Pont II*), the petitioners in *du Pont I* and *du Pont II* (cross-respondents here) filed a motion to consolidate the cases. The Solicitor General has also supported consolidation of the cases. See Memorandum For Respondent in No. 75-1473, at 1.

cross-petition would add a single question respecting EPA's standards for new sources, *i.e.*, whether such standards should contain an "escape mechanism" enabling a new source to obtain, upon an appropriate factual showing, a discharge permit different from such a standard.²

The question posed by the cross-petition is properly presented on this case. It would seem appropriate to decide the new-source issue concurrently with the existing-source questions.

Respectfully submitted,

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² On the merits, the cross-respondent companies submit that the court of appeals was correct in ruling that EPA's new source standards should provide an "escape mechanism". Provisions of this Act, as well as judicial doctrines of construction for statutes providing agencies with rulemaking authority, support a "safety valve procedure" linked to special facts in particular cases. See, *e.g.*, *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972); *WAIT Radio v. Federal Communications Commission*, 135 U.S. App. D.C. 317, 418 F.2d 1153, 1157 (1969).